

CitiSteel USA, Inc. and United Steelworkers of America, AFL-CIO-CLC. Case 4-CA-17901

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On October 13, 1992, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the administrative law judge's decision, the Charging Party filed cross-exceptions and an answering brief to the Respondent's exceptions and brief in support of its cross-exceptions, the General Counsel filed cross-exceptions and an answering brief to the Respondent's exceptions and brief, the Respondent filed a consolidated answer and reply brief, and the Charging Party filed a reply brief to the Respondent's consolidated answer and reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs¹ and, for the reasons set forth below, has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

The complaint alleged, and the judge found, that the Respondent, CitiSteel USA, Inc. (CitiSteel or Respondent) is a successor to Phoenix Steel Corporation (Phoenix), and that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the United Steelworkers of America, AFL-CIO-CLC (Union) the collective-bargaining representative of Phoenix employees. For the following reasons, we agree with the judge's conclusion.

It has long been settled that an employer succeeds to the collective-bargaining obligation of another employer if (1) a majority of its employees had been employed by the predecessor, and if (2) similarities between those two operations manifest a "substantial continuity" between those enterprises. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41, 43 (1987), citing, inter alia, *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972). Here, the parties stipulated that on the representative-complement dates, April 17, 1989, for the production and maintenance employees, and June 13, 1989, for the clerical and technical em-

ployees, a majority of CitiSteel's employees were former employees of Phoenix. The issue in this case, therefore, is whether the similarities between the Phoenix operation and the CitiSteel operation manifest a "substantial continuity." We find, in agreement with the judge, that they do. The factors to look to in determining whether there is substantial continuity were summarized by the Supreme Court in *Fall River*, supra at 43, as follows:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and has basically the same body of customers

These factors are to be assessed primarily from the perspective of the employees. Thus, the question is "whether 'those employees who have been retained will . . . view their job situations as essentially unaltered.'" Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).

The plant under CitiSteel continues to make steel, as it did under Phoenix, and as it has for over 70 years. CitiSteel does not produce any new products. Eighty percent of CitiSteel's customers had been Phoenix customers. Admittedly, CitiSteel has narrowed the product line from the approximately 75 types of steel which Phoenix produced to 19, and has ceased production of specialty steel and finishing work. Such changes, however, will not preclude a finding of continuity if the basic job skills remain the same.³ We find that the job skills are substantially the same.

The production and maintenance employees at Phoenix were divided into 134 job classifications. CitiSteel has reduced the number of classifications to around 25. It has combined some jobs and has eliminated others. This change means that each employee now performs several job functions which had been covered by separate job classifications at Phoenix. While we find that this consolidation of function may require employees to perform some additional tasks, each one also continues mainly to perform work he had performed for Phoenix. When employees continue to perform substantially the same work that they did for the predecessor, the addition of some new job duties is not likely to change the employees' attitude towards their job to such an extent that it will defeat a finding of continuity of the enterprise.⁴

¹ We deny the Respondent's motion to strike the General Counsel's brief in support of the judge's decision, although we will admit the Respondent's brief to the judge into the record.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ *Fall River*, supra, 482 U.S. at 44 (change from converting dyeing to commission dyeing); *Good N' Fresh Foods*, 287 NLRB 1231, 1235 (1988) (change from predominant production of fresh baked products to predominant production of frozen baked products).

⁴ *Phoenix Pipe & Tube Co.*, 302 NLRB 122 (1991), enf'd. 955 F.2d 852 (3d Cir. 1991).

Because CitiSteel no longer produces specialty steel or performs special finishing work, the parts of the plant and equipment associated with those tasks are no longer in use. What is important, though, is that all of the Respondent's present facility was formerly a part of Phoenix's premises.⁵ Moreover, most of the departments occupy the same spaces and most employees work in the same areas as they had under Phoenix.

When CitiSteel took over the plant, much of the equipment was in need of repair. CitiSteel embarked on a \$25-million revamping of the plant. Some equipment was overhauled and some was totally modernized by adding technically advanced components. Nonetheless, even with these improvements, the individual worker continued, in most instances, to do the same job with the same tools as he had under Phoenix.

CitiSteel has made some changes in the management structure, employing fewer layers in the chain of command and a more simplified hierarchical structure. We note also that only 6 of the 22 managers at Phoenix are employed by CitiSteel and only 2 of CitiSteel's 10 supervisors had been supervisors at Phoenix. The Respondent has also made several improvements in the employees' working conditions, including repairs to the exhaust system in the melt shop, upgrading the locker room facilities, removing the timeclocks, providing different color hardhats, allowing all employees to use the parking lot once reserved for management, and more vigorously enforcing safety regulations. The changes must, however, be viewed from the perspective of the employees. We do not think that the changes substantially altered what the employees would consider to be their essential jobs. Thus, we find that these changes are insufficient to defeat a finding of successorship.

The Respondent relies heavily on the 23-month hiatus between the final shipment of steel by Phoenix and the first shipment of steel by CitiSteel. The Supreme Court in *Fall River*, held, however, that a hiatus is only one factor to be considered and "is relevant only when there are other indicia of discontinuity." *Fall River*, supra at 45. Here, the hiatus was marked by a continuing effort to first sell the plant and then, after its sale to the Respondent, to revamping and reopening the plant. While the Local Union was deactivated during the hiatus, representatives and lawyers for the International Union, which was the certified collective-bargaining representative of the employees, remained active, meeting with potential buyers, responding to former employees' inquiries, representing employee claims in bankruptcy proceedings,⁶ attempting to obtain commitments from the Respondent to recognize and bargain with the Union when it reopened, and encouraging employees to file applications with the Re-

spondent. We therefore find that this hiatus is insufficient to defeat a finding of successorship.⁷

Although each successorship factor must be analyzed separately, we are also required to consider the totality of the circumstances. *Fall River*, supra. A majority of the Respondent's employees had been employees of Phoenix; the Respondent's business is the production of steel as it had been under Phoenix; a majority of the Respondent's customers had been customers of Phoenix; the unit employees' job functions are basically the same as they had been at Phoenix; and the equipment used by the Respondent is substantially the same as at Phoenix. The hiatus period was marked by several attempts to sell the plant and then to revamp the plant when finally sold. During this entire period, the International Union remained active. From the employees' perspective, these facts would indicate a substantial continuity between Phoenix and the Respondent.

We find that the Respondent is a successor employer to Phoenix Steel. Accordingly, we conclude, in agreement with the judge, that the Respondent, as the successor to Phoenix, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the representative of its unit employees.⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, CitiSteel USA, Inc., Claymont, Delaware, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

⁷ See *Nephi Rubber Products Co.*, 303 NLRB 151, 152 (1991); *Phoenix Pipe & Tube Co.*, supra.

⁸ We also agree with the judge that this finding applies to the clerical and technical unit as well. The Respondent argues in its exceptions that this unit is inappropriate and, therefore, it did not violate the Act by refusing to recognize and bargain with the Union with respect to these unit employees. We disagree. The Board has long held that it will not disturb the recognition of an established bargaining unit unless required by the Act or compelling circumstances. *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965). The burden of proving such circumstances lies clearly with the Respondent. *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988). The Respondent has not offered, nor do we find, any evidence which would require us now to set aside Phoenix's recognition of this long-standing unit.

William E. Slack Jr. and Richard Wainstein, Esqs., for the General Counsel.

John S. Irving, Kenneth N. Bass, and James F. Basile, Esqs., (*Kirkland & Ellis*), of Washington, D.C., for the Respondent.

Richard J. Brean, Esq., of Pittsburgh, Pennsylvania and *Joseph Lurie, Esq. (Galfand, Berger, Lurie & March)*, of Philadelphia, Pennsylvania, for the Charging Party.

⁵ *Capitol Steel & Iron Co.*, 299 NLRB 484, 487 (1990).

⁶ Phoenix declared bankruptcy on April 20, 1987.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on November 4 to 8, 12, 15, 19, and 20, 1991, in Philadelphia, Pennsylvania. The charge was filed on February 16, 1989, by the United Steelworkers of America, AFL-CIO-CLC (the Union). The complaint issued May 9, 1991, and was amended on September 13, 1991, to allege that CitiSteel USA, Inc. (the Respondent, Employer, or Company), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. More particularly, the complaint alleges that Respondent violated Section 8(a)(1) by threatening and interrogating employees, 8(a)(1) and (3) by refusing to hire employees who had previously been employed by Phoenix Steel Corporation (Phoenix), and 8(a)(1) and (5) by refusing to recognize and bargain with the Union and by unilaterally changing the terms and conditions of employment of its employees. In its answers to the complaint and amended complaint, Respondent denies the commission of any unfair labor practices.

Prior to the opening of the hearing, the Parties entered into an informal settlement agreement which disposed of all of the independent 8(a)(1) and (3) allegations as well as the 8(a)(5) allegation concerning unilateral changes. The only issue remaining for hearing was the allegation that Respondent failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. All parties filed briefs. On the entire record,¹ including my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT²

The Claymont Plant—A History

Respondent's steel mill was built by the Worth Steel Company in 1917 in Claymont, Delaware. Worth operated the mill from 1917 to 1951. In 1943, the NLRB certified the Union as the exclusive collective-bargaining representative of Respondent's production and maintenance employees employed at Claymont. Following certification, the Union chartered Steelworkers Local 3182 to assist in the administration of the collective-bargaining agreements covering the production and maintenance unit.

In March 1951, Colorado Fuel and Iron Company (CF&I) purchased Worth Steel and its Claymont mill. It continued to operate the mill as an integrated mill, converting ore into finished steel products.

In October 1960, Phoenix purchased the Claymont mill from CF&I. It already owned plants in Phoenixville and Chester, Pennsylvania. At the time Phoenix purchased the Claymont plant, it was producing a variety of specialty steel products including both carbon and alloy steel plate, welded pipe, pressed and spun heads, bridge girders, and small

stampings from steel plate. In 1962, Phoenix added a new heat treating and finishing plant at Claymont which enabled it to produce additional types of specialty steel.

Throughout the 1960s, Phoenix continuously purchased additional new equipment to modernize its facilities. The new equipment permitted increased production of a still greater variety of specialty steels. The modernization was extremely expensive and was financed by a sale-leaseback arrangement with the Northern Delaware Industrial Development Corporation (NDIDC) whereby Phoenix sold its Claymont plant to NDIDC then immediately leased it back.

Despite placing itself in long-term debt, in its attempt to modernize, Phoenix found, for whatever reason, that it continued to lose money. It reacted by modernizing even further by purchasing additional equipment and modifying the equipment just recently purchased. The result was that new varieties of specialty steels were produced in the early 1970s but the cost of the additional modernization drove Phoenix further into debt.

In the late 1970s, the same scene was repeated. More capital was successfully obtained from a new purchaser of Phoenix stock. More money was invested to update the equipment, with emphasis again on increased production of specialty steel products. The result was that Phoenix continued to lose money.

In the early 1980s, the entire steel industry was hit by a recession. The Claymont plant was particularly hard hit and Phoenix, in August 1983, filed a petition for bankruptcy under chapter 11 of the bankruptcy code.

In July 1985, while Phoenix was still in bankruptcy, Guardian Ventures, a partnership, bought all of its stock. At the time, Phoenix's chief executive officer was Eugene Hug. In May 1986, he was replaced by Robert Garvey. Garvey intended to make certain changes in the operation of the Claymont plant. More specifically, he planned to cease all specialty steel operations and concentrate on the production of commodity carbon steel. Guardian Ventures, however, vetoed Garvey's plan and in November 1986, he resigned, leaving the Claymont plant to continue operating just as it had for years. His resignation gave rise to rumors that the plant would close. Failure to keep up inventory and to order spare parts fueled these rumors.

A new management team replaced Garvey. It was made up of people who were not experienced in steelmaking but, as it turned out, that fact was of little moment, for their most immediate projects were to close down the Claymont plant, seek out a buyer and, at the same time, begin negotiations with the Union whose collective-bargaining agreement was due to expire on March 31, 1987.

On December 4, management announced that it was closing down the melt shop and laying off 220 employees. On December 5, the Wilmington Morning News reported that the rest of the plant could close within weeks unless a buyer was found. The melt shop closed December 13, 1986, and thereafter one department after another closed down, with the employees concerned, laid off until only a skeleton crew remained to perform maintenance and collect scrap for sale to other steel producers.

Starting even before the actual closing of the Claymont plant, a series of newspaper articles was published and a number of events occurred during the next 2 years, which sometimes raised and sometimes dashed the hopes and po-

¹ Respondent's motion to correct the record is hereby granted.

² In its answer, Respondent concedes jurisdiction and the status of the Union as a labor organization.

tential expectations of the employees of the Claymont plant that the plant would be sold and reopened and that they would be rehired to their old jobs.

On January 22, 1987,³ the Philadelphia Inquirer carried a story that five potential buyers were bidding for Claymont and that it was expected that a sale would be completed in the near future. On the same date, however, and in the days that followed, interviews with employees and union officials reflected little hope for the future of the Claymont plant.

On January 23, the rolling mill was closed down. Additional employees were laid off. Only a few workers were kept temporarily to finish and ship the remaining slabs. Despite skepticism among some of the Claymont employees, efforts to sell the plant continued. On January 31, Asset Management Associates, an investment partnership with steel mill experience offered to purchase the Claymont plant for \$6.5 million. No agreement was reached, however, and by April 1, the offer had been withdrawn and the deal declared dead.

After the plate mill closed down, the president of Local 3182, Walter Brodzinski, contacted Joseph Hicks, a counselor for the Division of Employment and Training of the Delaware Department of Labor and arranged for Hicks to visit the union hall and conduct a series of job search workshops to provide skills and motivation for workers to find new jobs. A representative of United Way also attended these workshops to advise the 130 to 140 unemployed steelworkers, who initially signed up for the course, what services were available to them. The workshops were conducted beginning in February and continued into April. By the end of the workshop series an estimated 230 former Phoenix employees had attended. Respondent contends that the Union, by arranging for these workshops, led the employees to believe that their relationships with the Claymont plant and the U.S.W.A. were permanently ended.

In February, the owners announced a potential offer had been received to buy the plant for \$8 million, dependent on the buyer obtaining financing. The financing, however, did not materialize and as the Daily Local News reported the story, the buyer terminated interest.

In early March, a group of investors lead by financier Robert Serlin offered to purchase the Claymont plant for \$8 million, again dependent on their first obtaining financing. Phoenix CEO Donald B. Lifton said that the offer was great news for the employees and their families. Undoubtedly, this news raised the hopes, if not the expectations, of the jobless.

While a number of employees had only their hopes, and remained unemployed, others actively sought, and some successfully, employment with other companies, some outside the area. Sometime after the shutdown, Brodzinski resigned and obtained employment outside the state. Certain employees concluded from Brodzinski's exit that he would not have left if there were a reasonable chance that the plant was going to reopen in the near future.

On March 17, after Brodzinski had resigned, Lynn R. Williams, International President of the U.S.W.A., wrote to Willie Walker, acting president of Local 3182, that since Phoenix Steel Corporation had ceased operations in Claymont, Local 3182 was being placed under an administrator and all the officers were thereby relieved of their duties. About the same time, the financial secretary of Local 6637 which represented

the office and technical employees, turned over her books to the administrator. She testified that there was no longer any work to do because there was no local union.

Subsequently, the International closed the local union hall in Claymont. In late 1988, about November, the Union sold the union hall. The International put the proceeds of the sale in an escrow account for the locals. The closure of the union hall had the effect, according to one of Respondent's witnesses, of convincing some union members that there was little chance that the plant would reopen.

Despite its disestablishment of the locals, the International remained active on the scene. On March 23, union representatives met with Serlin to discuss his offer, the reemployment of its members and its status as the representative of the plant's employees. Serlin was noncommittal, stating only that he would get back to them.

On April 1, Lifton predicted that the sale of Claymont to the Serlin group would be completed within 60 days. However, on April 20, Phoenix, unable to pay its debts, filed for chapter 11 bankruptcy. The Serlin group, at this time, announced that it was continuing its efforts to raise financing to purchase the Claymont plant.

Shortly after Phoenix filed for bankruptcy, the Union's attorney, Lynne Gerber-Saionz, filed claims on behalf of unit employees to obtain moneys owed to them by Phoenix—vacation pay and other benefits.

In May, she organized an Employee Creditors Committee (Committee) and was appointed its attorney. Members of the Committee included representatives of both the production and maintenance and the clerical and technical units at the Claymont plant. Gerber-Saionz represented the interests of the employees by attending the bankruptcy court hearings as well as negotiations with prospective purchasers. She held regular meetings with committee members, also attended sometimes by union officers. At these meetings, employee claims against Phoenix were discussed as well as prospects for the sale of the Claymont plant and the reemployment of its employees. Gerber-Saionz periodically sent letters to committee members summarizing recent developments.

While Gerber-Saionz continued her efforts through the Committee to obtain moneys for the employees, in the bankruptcy proceedings, the International, through its treasurer, James N. McGeehan, announced on May 4 that it was denying payment of strike benefits to Claymont employees. He explained that, "in contrast to a normal work stoppage, the current Claymont situation involves a plant that is virtually shut down, where all but a handful of employees have performed no work at all since the first of the year."

The denial of benefits plus the fact that there were no meetings of the local membership nor correspondents, nor literature from the Union concerning the Claymont plant and the possibilities of its reopening may have convinced some employees that there was little chance of the plant reopening. This, at least, is the position of Respondent.

About May 22, the Lukens Steel Corporation expressed an interest in buying the steel production equipment at Claymont to produce slabs for its rolling plants in Coatesville and Conshohocken, Pennsylvania⁴ and to lease

³ Hereinafter all dates are in 1987 unless noted otherwise.

⁴ Lukens made it clear that any deal would depend upon the condition of the equipment which had been idle for several months. On June 1, Lukens denied that any formal agreement had been reached.

the rest of the property. Lukens continued to express interest in the Claymont plant throughout the next several months but nothing concrete was actually done at that time.

On May 29, Serlin announced that he had a plan to operate a minimill at Claymont that would employ 400 workers, and that he would seek \$9 million in loan guarantees from the State of Delaware to finance the project.⁵ On July 19, not to be outdone by Serlin, Lukens announced a plan to buy the Claymont plant for \$10 million and restart the melt shop with a work force of 200 employees.

On August 19, Phoenix announced that Lukens and Serlin had both been bidding to purchase the Claymont plant and that negotiations were progressing with both. Lifton said that Serlin now had obtained financing but that he would not want to say which of the two bidders were in the lead. Lifton added that several developers had offered to purchase a piece of land along the Delaware River, then owned by Phoenix, and that a number of their development plans were compatible with Lukens' and Serlin's plans to reopen the Claymont mill.

On September 2, Serlin announced that he had obtained financing in support of his bid from three Wilmington investors and that his plan would provide employment for between 400 and 500 workers.

On September 18, John Vogel, an International representative for district 7 of the USWA met with the Lukens vice president of human relations and other Lukens officials to discuss Lukens' plan to operate the Claymont steel production facilities. The Lukens representatives told Vogel that they intended to employ approximately 130 workers and that they planned to hire former Phoenix employees. They advised Vogel that they were willing to recognize the Union as the representative of the newly hired employees, and terms of a collective-bargaining agreement were discussed.

On September 30, Lukens made a formal offer to purchase the Claymont melt shop equipment for \$6 million and lease the melt shop building for \$50,000 per month. This plan would provide 150 jobs.

On November 10, union representatives again met with Lukens officials. At this meeting, discussions took place which were similar in content to those held at their previous meeting. Lukens advised the Union that if things worked out with the courts, they would schedule additional meetings in the future.

On or about November 26, several important developments occurred which were to affect the future of the Claymont facility. First, Lukens withdrew its offer to run the melt shop and instead proposed to purchase the melt shop equipment and move it to one of its other plants in Pennsylvania. Second, Lifton announced that Hong Kong investor Chang of Wai Hing & Co. had submitted a bid for the Claymont plant. Though Chang's bid was considered too low, he was expected to submit a higher bid. Finally, Serlin assured Phoenix that his group was still interested, would study the bids of the other parties, and would determine later how to respond.

Phoenix tentatively agreed to accept Lukens' offer to purchase the melt shop equipment for \$6.6 million subject to the approval of the Delaware Bankruptcy Court. Announcement of the deal in the newspapers must certainly have had an ad-

verse effect on the hopes for reemployment of the jobless Claymont steelworkers. However, the almost simultaneous appearance on the scene of Chang, as a new potential buyer, must certainly have had the opposite effect. Although, by this time, many of the Claymont workers had found new jobs, others had not.

Also on November 26, it was learned that Phoenix planned to sign a letter of intent, on or about November 28, with Delle Donne & Associates of Wilmington, to purchase the land on which the Claymont plant stood. Delle Donne, a developer, it was known, intended to build a shopping mall and office buildings on the site. If this deal went through, that, of course, would squelch any hopes of reemployment of the Claymont steelworkers.

The offer of Lukens to purchase the melt shop equipment was tentatively accepted.⁶ However, the other interested parties were given until December 14 to submit competing bids. The deadline for submitting bids was later extended to December 21 and then to December 31.

On December 22, Chang (Wai Hing) made a \$13 million offer to buy Claymont and announced that he would operate the plant for at least 5 years and employ 500 employees.

On December 23, Phoenix announced that it would accept Chang's offer to purchase the Claymont plant, if it could be certain that he had financial backing. Lifton commented that he would prefer Chang's offer to purchase and operate the plant to Lukens' offer to purchase and remove the equipment because it would preserve the jobs of the steelworkers.

On or about December 30, it was revealed that Chang's potential financial backer was CITIC,⁷ an agency of the People's Republic of China with great financial strength. On the basis of Chang's offer, Lukens' bid to purchase the Claymont equipment was rejected by the Bankruptcy Court on December 31.

On the evening of December 31 Chang (Wai Hing) reached agreement on the sale of the Claymont plant, subject to bankruptcy court approval. Steelworkers attorney, Gerber-Saionz, attended some of the sales negotiations between Phoenix and Chang (Wai Hing) and took an active part in the negotiations. Steelworkers representatives John Vogel and Norman Hayman attended at least one bankruptcy hearing in Wilmington during which they met briefly with Chang. They advised Chang that the Union represented the Claymont plant employees and was interested in negotiating a collective-bargaining agreement if he should purchase the plant. Chang promised to consider the matter.⁸

Though the sales agreement was signed on December 31, it still had to be approved by the bankruptcy court and Chang still had not yet completed arrangements for financing. The following day, the story in the newspapers announced that Phoenix had rejected the Lukens bid and had

⁶Phoenix was in a position to negotiate various agreements because none of them could be finalized without the approval of the Bankruptcy Court Judge.

⁷The China International Trust and Investment Corp. is an agency which was established by the Chinese government to make both domestic and overseas investments, to finance the purchase and operation of businesses and to manage them following their purchase.

⁸On four or five occasions in the next several months, Gerber-Saionz asked Chang's attorney, Carl Fernandez, to arrange a meeting between Chang and the Union. Fernandez promised to speak with his client but indicated that a meeting was unlikely.

⁵Serlin's efforts were unsuccessful.

sold the mill to Chang (Wai Hing) who had potential financial backing from CITIC. The story went on to state that the plant might reopen as early as April 1988, and employ up to 500 people within a year.

Hayman and Vogel testified that throughout 1987, Claymont employees contacted them on a regular basis, both through visits and by telephone, to discuss the newspaper articles dealing with the sale and possible reopening of the plant, and to seek further information on these matters. The union representatives would describe to the former Phoenix employees the status of negotiations at the time. Neither Vogel nor Hayman were specific with regard to these 1987 visits and telephone conversations and no witnesses were called to testify concerning them. Nevertheless, their testimony is credited.

Attorney Gerber-Saionz testified that she had received similar inquiries from former Phoenix employees, three to four phone calls per day, and more when stories appeared in the newspapers concerning potential sales of the Claymont plant. She also had discussions at bankruptcy court hearings which laid off employees frequently attended to find out if and when the plant was going to reopen. Gerber-Saionz's testimony was not supported by the testimony of other witnesses but is fully credited.

On January 12, 1988,⁹ the Union sent a letter to Chang stating that its members were available for work and requesting an opportunity to negotiate a collective-bargaining agreement on their behalf. As news concerning the sale of the Claymont plant reached the public, the former employees of Phoenix increased their contacts with the Union. Their inquiries concerned whether and when they would return to work. Union representatives advised them that they were not sure when the plant would reopen but stated that former employees would probably have an advantage in filling the jobs when production resumed. When some of the former employees expressed the expectation that they would be recalled in order of seniority, they were told that recall would not be automatic and that they would have to submit employment applications to obtain employment with the new company.

On February 1, Phoenix filed an application in the bankruptcy court for an order approving the sale of the Claymont facilities to Chang. No action was taken by the court, however, because on February 6, the local press carried an article which reported that the Defense Department had intervened in the sale of the Claymont mill on security grounds because Claymont had produced armor for tanks and hull plates for submarines. The Justice Department, at the Defense Department's request, agreed to ask that the sale be delayed until the security issue was resolved.

Shortly thereafter, Representatives James Florio of New Jersey and John Bryant of Texas became involved in the issue when they sent a letter to the Secretaries of Commerce, Defense, and Treasury stating:

Our concern is that this foreign takeover of a U.S. company, if approved, may give the government of the People's Republic of China . . . access to the technology Phoenix Steel uses to produce items used by the Defense Department to an extent and in a manner that may impair our national security.

On February 10, Senator John Heinz of Pennsylvania voiced similar concerns.

The Commerce Department responded to these inquiries by stating:

The Arms Export Control Act prohibits selling weapons or materials with potential military applications to a list of countries, including China . . . That would include military specifications for armor plate to be used in tanks or submarines, which may be in Phoenix Steel's files.

In addition to governmental objections to the sale based on security grounds, other objections to the sale were filed based on creditor and environmental interests. Nevertheless, on February 10, the bankruptcy court tentatively approved the sale of the Claymont facility by Phoenix to Wai Hing with the provision that the parties resolve the various outstanding objections. The following day, February 11, the newspapers reported the court's approval of the tentative sale. They reported that the sale would not become final before March 15, at which time the court was scheduled to reconvene to consider the financial arrangements made by Chang with CITIC which were expected to be in place by that time. The extension of time, granted on February 10, also gave Phoenix officials additional time to convince the government that material security issues were not involved in the sale.¹⁰ Meanwhile, on February 11, Senator Heinz, addressing a group of citizens, said that he would attempt to block the sale if he learned that sensitive military technology could fall into the hands of the People's Republic of China.

In February, Chang continued his attempts at obtaining financial backing for the purchase of the Claymont sale. He contacted a number of potential investors around the world while he awaited a decision by CITIC as to whether it would finance the purchase. Chang was unable, in February, to obtain backing elsewhere, so again came back to CITIC. In late February, CITIC sent a delegation to Claymont to do a site investigation and collect more information. The delegation included a lawyer and several engineers. CITIC, at the same time, engaged the firm of Morgan Grenfeld to determine whether the Claymont plant could be operated profitably. Morgan Grenfeld concluded that the plant could operate profitably if it was nonunion and if certain changes were made in the sales agreement.

On March 11, the Defense Department announced that the sale of the Claymont plant by Phoenix to Wai Hing, did not pose any security risk. It withdrew any objections which had been voiced previously.

In March, CITIC assigned Lu Ming, the manager of its metallurgical department, to evaluate the Morgan Grenfeld feasibility study and review the findings of the delegation. In the meantime, Chang continued to look elsewhere for financial backing while he awaited CITIC's decision. As a result of the delay, the bankruptcy court postponed the approval hearing from March 15 to April 4. The March 16 headlines read: "PHOENIX SALE OFF UNTIL AT LEAST APRIL 4." The article advised that "the possible role in the deal of the People's Republic of China" remained "uncertain."

¹⁰Certain documents which were considered sensitive had already been purged from the Phoenix files and returned to the Electric Boat Division of General Dynamics.

⁹Hereafter, all dates are in 1988 unless noted otherwise.

As of April 4, CITIC had not yet made a decision, and the approval hearing was again postponed. The following day, the Wilmington News Journal's headline read "SALE OF PHOENIX DELAYED FOR 3RD TIME." The story beneath the headline told readers:

Difficult negotiations between the prospective Hong Kong buyer and his Chinese backers delayed the sale Monday of the Phoenix Steel Corp. mill in Claymont for the third time. . . .

The court and Phoenix's creditors . . . are being kept in the dark about the progress of the deal.

The bankruptcy judge said that apparently there were some disputes between Chang and CITIC which might require resolution in court. The approval hearing was, accordingly, postponed until April 26. Chang's lawyer said that the differences between the two were not serious enough to kill the deal.

After obtaining a report from Lu Ming, CITIC management, on April 20, approved the negotiation of a closing agreement.¹¹ The following day, it was reported that Phoenix, Chang and CITIC had entered into a final letter of understanding and that the last hurdle to finalizing the sale of the Claymont plant had been cleared.

On April 26, Chang submitted his financing package to the bankruptcy court. This reflected that CITIC would be the majority partner in the operation of the Claymont plant. The court approved the sale.

On April 27 the newspapers announced that the bankruptcy court had given final approval to the sale of the plant. Chang was quoted as stating that the plant would be employing 300–350 people within a year.

Though the sales agreement had been finalized, there still remained several obstacles which stood in the way of the new owners proceeding towards takeover and production. One was Delaware's Coastal Zone Act. This law precluded certain types of industrial facilities from locating in coastal areas but allowed existing facilities to continue to operate. However, it provided further, that any existing facility which closes must, in order to retain its exemption, reopen within one year.

Chang was concerned that this provision might be interpreted in such a way as to prevent the Claymont plant from reopening. Indeed, the plant had been closed for over a year and would not be in shape to start production for another several months. Therefore, even before the deal was completed, Wai Hing sought an amendment to the Act to treat the Claymont mill as an exception to the Act, provided it resumed operation within 2 years of its shutdown. On March 28, the amendment was passed by the Delaware House of Representatives as House Bill 444.

In April, Bill 444 was introduced in the Senate. In early May, Senator Jacob Zimmermann introduced an amendment which would have limited the use of a port facility located at the Claymont plant. About the same time, Senator Harris McDowell¹² introduced an amendment to the bill, at the be-

hest of the Union, which would require the purchaser of the Claymont plant to give preference to former employees of Phoenix in hiring its work force. The proposed amendments complicated matters for Lu Ming because CITIC opposed both amendments and probably would not close the deal if either passed or if House Bill 444, in its original form, failed to pass. CITIC would not risk investing in the Claymont purchase unless there was assurance that the plant could be reopened.

On May 11, the Senate Natural Resources and Environmental Control Committee held a hearing regarding Bill 444 and the proposed amendments. Union representative Norman Hayman spoke in favor of the hiring preference amendment. Grover Brown, another one of Chang's attorneys, spoke in opposition to both amendments. Brown stated that his client intended to provide blue-collar jobs to those who once had them at the plant and expected former employees to be favorably considered because of their experience.

On the day of the May 11 Senate hearing, the press reported that "there have been no assurances the bill will pass the Senate or be signed by Gov. Castle, even though purchase plans are well on the road to completion." The article quoted Castle as saying that he was "unsure whether continuing the steel operation was the best use of the land."

At the time of the May 11 Senate hearing, a fairly strong and active environmental movement made its opposition known. It was opposed to any steel mill operating at Claymont and therefore opposed passage of Bill 444. A representative of Delaware Citizens for Clean Air was quoted as stating that "his group has battled the various owners of the mill for 28 years over air pollution problems." A spokesperson for the Delaware Audubon Society stated, "We want to see the demise of heavy industry in the zone."

On May 12, attorneys for Phoenix told the Senate Committee that "if the state's coastal zone law isn't loosened quickly, plans to reopen the idled Claymont steel mill 'will all go down the drain.'"

Following the May 11 hearing, Brown and Fernandez approached Hayman. Brown told Hayman that he had no problem with what the Union was trying to do for the Phoenix employees and asked what he could do to help. Hayman suggested that CITIC representatives meet with the Union. On May 17, Vogel, Gerber-Saionz and another union attorney met with CITIC representatives at a hotel in Wilmington. The CITIC representatives questioned the union people about the structure of unions. The Union representatives sought assurances that the new owners would rehire former Claymont employees, recognize the Union as their collective-bargaining representative, and negotiate an agreement. The CITIC representatives stated that they would take these suggestions under advisement and get back to them.

On May 19, a newspaper story appeared that quoted attorneys for Chang as saying that without HB 444, long-term financing would not be available for resuming steel production. On May 20, the Delaware State News reported that, "the principals in the purchase made it clear that if the bill was not passed by June 1 when the investors are scheduled to settle, the whole deal may be off." The Union too was aware of this fact.

Also, on May 19 another story appeared which posed a potential complication. It was a report that the governor's office and the potential buyers' lawyers were "working on an

¹¹ The closing agreement was conditioned upon Phoenix accepting certain changes. These were subsequently negotiated without difficulty.

¹² On May 10, Chang, through his attorney, Fernandez, wrote a letter to Senator Zimmermann opposing McDowell's preferential hiring amendment because it "muddies up the water."

arrangement that would allow the state the possibility of recovering \$2.3 million it will have to pay holders of state-backed bonds sold for a previous owner to buy equipment." The article continued, "it isn't clear whether the Senate will be willing to pass a change in the Coastal Zone Act." Senator Zimmerman had been quoted earlier as stating that the bond issue was "part of the overall picture."

On May 20, local newspapers reported, "several senators considered the bonds a significant issue in deciding the coastal zone question." Also on May 20, the press reported that Governor Castle had announced his support for the amendment to the Delaware Coastal Zone Act permitting the continued use of Claymont as a steel plant. More specifically, the article stated that the "Castle administration successfully cut a deal" to solve the bond problem. However, the headline included the phrase "uncertainty abounds" because the Senate had not yet made up its mind about the legislation as a whole. Although Chang had agreed to a \$2.3 million lien on the property to satisfy the bondholders, the issue was not definitely resolved. Governor Castle stated, "Everything is somewhat uncertain."

On May 20, CITIC announced publicly that passage of the port facility or hiring preference amendments "would kill the sale."

On May 31, the Senate debated and voted on the bill and its amendments. Brown, during the debate, repeated Chang's earlier promise to hire Claymont's former employees because their demonstrated skills would help in getting the plant open.

That day, the bill passed with both the port facility and hiring preference amendments defeated. The governor signed the bill and CITIC was in a position to close the deal.

On June 1, the Wilmington News Journal reported that the Senate had passed the amendment to the Delaware Coastal Zone Act and that although the hiring preference amendment had been defeated, Chang's attorney had promised that the new owner intended to hire as many former Claymont employees as he could.

On June 1, Chang (Wai Hing) assigned his interest in the Claymont plant to CITIC. CITIC had already formed CitiSteel, a Delaware corporation incorporated on May 27, to operate the facility.

As part of the sale, CitiSteel agreed to assume a number of Phoenix's obligations. These included the lease agreement which Phoenix had with the NDIDC and an agreement to effectuate an environmental cleanup plan approved by the Delaware Department of Environmental Resources. With regard to the latter obligation, Lu Ming had hired Environmental Resources Management to conduct studies on the site to identify all environmental problems. He then negotiated an agreement with the local EPA office and entered a consent decree on June 1. Pursuant to that agreement, CitiSteel would eventually spend \$2 million to clean up the site.

On June 4, the press announced that CitiSteel had acquired the plant. On or about that day, it took possession of the mill. It hired Hearn and the four former Phoenix supervisors who had been working with him at the mill since it had shut down. Hearn was named plant manager and the four supervisors were given positions similar to those they had occupied prior to the mill's closing.

On June 5, CITIC officials toured the facility. On June 6, the press, in covering the tour, reported: "CitiSteel expects

to make the same amount of steel with 300 people that earlier owners employed 600 to 1000 to make." The same article stated that CitiSteel had announced that it intended to spend \$10 million modernizing the plant, reconditioning its electric furnaces, continuous caster and rolling mills. It stated that operations would resume by October 1. The press also reported that Chang and CITIC officials had not decided whether to oppose a union at the plant, but that many who had come to know them while negotiating the deal, predicted that they would not favor a union. The article emphasized that CitiSteel would not produce specialty steels, as had the previous owners, but would concentrate instead on the commodity steel market where steelmakers compete for price. Finally, the article described the plant as being in very bad condition.

In late June, subcontractors began work on the refurbishing of the plant, work which continued on into early 1989. Hearn and the four former Phoenix supervisors supervised the work of the subcontractors. One of the subcontractors, Erectix, employed former Phoenix maintenance employees to do refurbishing work at the plant. Erectix was owned by a former Phoenix employee. Lu Ming initially felt that the refurbishing would take 4 to 6 months. As it turned out, conditions were much worse than originally anticipated. Moreover, some parts were not susceptible to repair and had to be replaced. The refurbishing took several months longer than expected.

Newspaper articles published in the Wilmington area covered the progress of the refurbishing project throughout the summer and into the fall. One such article reported that CitiSteel had "committed orally to rehiring qualified former Phoenix workers," and expected to employ 300 to 350 workers initially.

During the summer, CitiSteel initiated a plan to hire a managerial and supervisory staff. With regard to rank-and-file employees, the lieutenant governor of Delaware, S.B. Woo, aware of CitiSteel's hiring intentions, wrote letters to CitiSteel's chairman on August 4 and 15, thanking him for meeting with a representative of the Union and suggesting that additional meetings be held with the Union. On August 30, Respondent replied noncommittally. On September 7, the News Journal reported that the "rehiring of all former Phoenix Corp. employees at the revitalized plant and immediate recognition for their union was unlikely."

On September 9, Steelworker District Director John Reck sent a letter to CitiSteel demanding recognition as the collective-bargaining representative of the production and maintenance and clerical and technical units of Respondent's employees. He also requested that negotiations begin toward collective-bargaining agreements covering these units.

On September 28, Woo again wrote to CitiSteel urging Respondent to meet with the Union. On October 4, CitiSteel's Chairman of the Board Lu Ming responded terming the request for recognition "premature" but holding open the possibility of "such a meeting in the near future." Lu advised Woo that Respondent would contact him when it "concluded that such a meeting would be appropriate."

During September, CitiSteel continued to publicly proclaim its intention of hiring an initial work force of between 300 and 350 employees. Subsequently, a story appeared in the Sunday News Journal quoting CitiSteel president, Jim Hasson, as stating that initially Respondent's complement

would be only 100 workers and that the number would thereafter build slowly to a full work force of 350.

While these announcements were being made in September, 12 to 15 contractors employing between 75 and 150 workers, at different times, were involved in revamping the plant. The equipment had deteriorated to the point where, after 2 years of just sitting there, extensive repairs and revamping had to be undertaken before the plant could run. The refurbishing had to be continued into January 1989. During this period, entire machines had to be shipped out of state to Michigan, Ohio, and elsewhere to be rebuilt and all the electrical equipment had to be revamped.

In addition to equipment refurbishing, the plant itself required repair. There were holes in the roof and breakage throughout the plant. The main office building's boiler had broken down, so that had to be renovated. All of these repairs, 650 projects in all, required time during which no production took place. There were 10 to 12 CitiSteel employees engaged in cleanup. This extended the hiatus between the end of production and its start up even further.

In early October, CitiSteel placed advertisements in the newspapers for production and maintenance employees. That month, it began to hire significant numbers of employees to do cleanup work and to attend safety and job training classes.

On October 7, the Union sent a letter to all former Phoenix unit employees. The letter advised them that Respondent was accepting applications and urged them to apply. It stated that the Union would represent the employees hired by CitiSteel if a majority of people hired had previously worked for Phoenix. It scheduled a meeting for all former Phoenix employees for October 27.

Meanwhile, on October 9, Jim Hasson, CitiSteel's new president, was quoted as saying, "We are going to hire the best people that we can possibly find. We are going to look at everyone available, whether they have been a former employee or not." He said that CitiSteel planned to make a few grades of basic steel plate very well. The same article noted that the Union had sold the local union hall and no longer had an office in Delaware and that John Reck, director of District 7, USWA, whose office was located in King of Prussia, Pennsylvania, was not responding to repeated phone calls.

At the October 27 union meeting, the Union urged those present to apply for work at CitiSteel and many did. On November 14, the first production workers began working for Respondent.

On December 1, Reck sent a letter to Lu Ming renewing his demand for recognition and requesting a meeting to discuss CitiSteel's hiring practices. On December 20, Jerry Downie, CitiSteel's director of human resources replied, declining Reck's request for a meeting and stating that CitiSteel was not a successor to Phoenix. He advised Reck that recognition of the Union as the exclusive collective-bargaining representative of its employees would be unlawful.

On January 29, 1989,¹³ a newspaper article was published which discussed CitiSteel's commitment to operating the Claymont plant as a minimill. It informed the general public,

including the former Phoenix employees, how the Claymont plant would be operated once reopened.

Between mid-February and March, Respondent began melting steel and producing rolled steel plates. As of April 17, it was operating the melt shop on two shifts and the plate mill on one shift. Maintenance employees were working three shifts and shipping employees two shifts. As of April 17, CitiSteel had hired enough employees to constitute a representative complement of employees at the Claymont plant. The plant employed 124 production and maintenance employees. A majority of these employees had previously worked for Phoenix Steel in the equivalent unit.¹⁴

Respondent continued to hire employees and increase production throughout 1989. It reached full production in March 1990 at which point it employed a full complement of employees. Respondent, by this time, was operating the melt shop three shifts and the plate mill two shifts, per day.

The Phoenix and CitiSteel Operations a Comparison Production and Maintenance

The Claymont mill under Phoenix Steel in 1986 produced commodity grade carbon steel plate. This basic steel accounted for 80 percent of the mill's production. The mill also produced alloy steel plate, heat-treated carbon plate and other specialty steels.¹⁵ Phoenix sold about half of its output to service centers and the other half to end users.

Phoenix Steel produced a broad line of construction, marine, pressure vessel and other steels of commodity and specialty types. The types of steel it produced numbered approximately 75. It also rolled and treated stainless steel products provided by outside customers and produced ingots at the Claymont facility for use at the Phoenixville facility.

Phoenix not only produced a great variety of specialty types of steel but also many grades, sizes, and specifications of carbon steel plate.

Phoenix, with its emphasis on specialty products concentrated on quality at the expense of quantity in order to raise its margin of profit per sale. This resulted in Phoenix becoming a job shop for end users. This meant, according to the testimony of Robert Garvey, that each order had to be treated as a separate operation, with constant switching of the operation to meet the requirements of the numerous and varied orders. Each individual plate in a customer's order had an identity which had to be maintained throughout the entire production cycle. The exact production status of each individual plate had to be known, where it was, and where it was going next. The special attention which had to be paid to the production of specialty steel and end user orders often required the employment of additional white-collar workers such as expeditors and metallurgists, with the result that each ton of steel produced cost almost twice what it would cost the industry as a whole.

When CitiSteel purchased the Claymont mill, it narrowed its product line from approximately 75 types of steel to about 19, all commodity grade carbon steel, no specialty types. It produced no new types of steel but continued production of

¹³ Hereinafter, all dates are in 1989 unless noted otherwise.

¹⁴ In 1986, Phoenix Steel had employed 557 production and maintenance employees on three shifts per day, in all departments except the plate mill which operated two shifts.

¹⁵ Specialty steel accounted for between 30 and 35 percent of sales in dollars.

19 types previously produced by Phoenix. It discontinued rolling and treating stainless steel for outside customers and no longer produced ingots for the Phoenixville plant.

CitiSteel produces only 10 to 15 percent of the carbon plate specifications that Phoenix did. Nevertheless, as to those carbon plate steel products that CitiSteel now sells, which were sold by Phoenix Steel, CitiSteel sells much more of them than Phoenix.

CitiSteel's shift in product has caused some shift in the customer base. In 1989, 80 to 85 percent of CitiSteel's customers were service centers. Similarly, 80 percent of CitiSteel's customers had been Phoenix customers but only 40 to 45 percent of Phoenix's customers were later customers of CitiSteel.

In 1986, Phoenix Steel's management consisted of several levels. Immediately above the rank-and-file employee was his foreman. The foreman, in turn, were responsible to one of several general foremen. Several of the general foremen were responsible to superintendents. On the production side, the superintendents reported to a layer of managers. On the maintenance side, which had its own chain of command, the superintendent and three of the general foremen reported directly to the director of maintenance. The director of maintenance and the three production managers were directly under the plant manager who was responsible to the executive vice president.

At Phoenix, production and maintenance each had its own chain of command which was not joined until it got to the plant manager level. Thus, the director of maintenance, acting independently, with his own set of priorities, might select one project for his maintenance crew while the production managers, with their own set of priorities might have preferred the maintenance crew to be assigned to a different project. Such differences, when they occurred, would have to be ironed out by the plant manager.

Phoenix's chain of command included 35 foremen, 13 general foremen, 4 superintendents, 4 managers, the director of maintenance, the plant manager, and the executive vice president.

As of April 17, CitiSteel's management was far more simplified. Thus, immediately above the rank-and-file worker was a line of supervisors. With a single exception, the supervisors were responsible to general supervisors. These, in turn, were responsible to managers who reported to the vice president of operations.

CitiSteel's chain of command, as of April 17, consisted of 10 supervisors, 6 general supervisors, 5 managers, and a vice president of operations. The production and maintenance chain of command was a single consolidated entity and was smaller than Phoenix had had, just 22 management personnel in all.

At CitiSteel, maintenance was integrated into the two main operations sections, steel production and plate production. The manager of each had his own general supervisor of maintenance reporting to him.

As of April 17, 6¹⁶ of the 22 managerial personnel employed by CitiSteel had been managerial employees at Phoenix. Two of CitiSteel's ten supervisors had been foremen at

Phoenix Steel. Respondent's witnesses testified that CitiSteel did not hire more of Phoenix Steel's managerial personnel because it did not want to repeat the same mistakes and wanted to create a new face. Most of the Phoenix managerial personnel who were hired "had some indispensable understanding" of the equipment at Claymont, which was crucial during the revamping period. Lu Ming testified that CitiSteel really needed some people who were familiar with the equipment.

Respondent asserts that because there are fewer supervisors at CitiSteel than at Phoenix there is less supervision and consequently a necessity for workers to take greater responsibility. Philip Raczkowski, a former millwright at Phoenix, working in mechanical maintenance at CitiSteel, testified that there is a substantial difference between the way maintenance personnel in the melt shop are now supervised at CitiSteel and the way they had been supervised at Phoenix. He noted that under CitiSteel, supervision consists of only a "daylight foreman and a superintendent." He testified, "We run the shop and if we have problems or if there are major decisions that need to be made, we'll go to a foreman and have them made, but most of the time, we make the decisions ourself." At Phoenix, "you were pretty much told what you had to do and you go do it."

Another CitiSteel employee, and former Phoenix steelworker, testified that his CitiSteel job is "a lot more extensive. You have a lot more responsibilities." At Phoenix, "we used to have a turn foreman and he would assign you the job for the night, and then whatever incidental repairs, he would come and tell you . . . such and such a thing needs to be fixed, go and get that." At CitiSteel, "We don't have anybody [supervising]. We've got two electricians on a turn and two mechanics."

Another rank-and-file employee of CitiSteel, Joseph Marvel, appearing on behalf of Respondent, testified that on the casting machine he operates at CitiSteel, he runs the controlling computer whereas the water channel controls, that did the work of the computer at Phoenix, were run by foremen rather than by production employees. He emphasized that the crew has more responsibility for getting the machine ready and casting the steel than they did under supervision at Phoenix.

Another of Respondent's witnesses, William Korpas, testified, in agreement with Marvel, that rank-and-file employees at CitiSteel are performing duties that had been performed by supervisors at Phoenix. He noted, in particular, "We have to write in a log book all our jobs that we've done for the shift. We also fill out a separate page on the jobs that are listed under areas and how many hours, man hours, we took to complete and that's turned in at . . . the end of every day." All of this work was formerly done by a turn foreman. Korpas also noted that at CitiSteel an employee will go to the storeroom himself for any parts he might need, whereas at Phoenix, the turn foreman would go to get the parts for him.

CitiSteel's dedication to the production of commodity steel for sale primarily to service centers permits it to stay in production and build up inventories from which to fill orders. Unlike Phoenix, it is not necessary to close down production to await specific orders to begin the production process. Likewise, without specialty steel production, the extra white-collar employees and paperwork necessary to track individual

¹⁶This figure does not include Rich Van Leer, a general supervisor-maintenance [worker] who had left Phoenix in 1976 to work for another company.

plates could be dispensed with and was, by CitiSteel, with apparent savings to the Company.

When CitiSteel took over the Phoenix plant, the equipment was in serious need of repair since it had not been used since Phoenix shut it down. CitiSteel did not merely have repairmen come in and put the equipment into running order but, in certain cases, sent out entire pieces of machinery to be revamped. It had some pieces of equipment totally modernized by adding technically advanced components. Thus, it added computerized controls to the continuous casting machine. Whereas, at Phoenix Steel, the continuous casting machine had been manually operated under the strict supervision of the shift foreman, at CitiSteel, the production workers operate the computerized casting machine themselves.

CitiSteel installed a static var compensating system in its electric arc furnace which increased the furnace's power factor from 70 to 90 percent. This resulted in a reduction of tap time by half an hour and a savings of \$30,000 per month. CitiSteel added a water-cooled roof to its furnace. This addition reduced the downtime required to repair the refractory roof on the old furnace and also reduced the tap time by half an hour per heat.

CitiSteel totally rebuilt the reheat furnace in the plate mill. The furnace was thereby enabled to increase its full hearth coverage from 60 to 100 tons per hour. The reheat furnace was restructured in such a way as to permit one employee to operate it whereas at Phoenix Steel it took two. CitiSteel rebuilt or made major repairs to every piece of equipment in the rolling mill including the cranes which were completely renovated. The revamping and modernizing of the plant eventually cost CitiSteel \$25 million.

Though there were major improvements made in the larger pieces of machinery and equipment, the individual worker continued, in most cases, to do the same job with the same tools.

In 1986, Phoenix's production of steel began when it purchased scrap from various vendors. The steel was delivered to its scrap yard where it was stored outside the melt shop. There, it was eventually inspected and sorted. The usable scrap was then loaded on railcars by which it was delivered to the scrap aisle of the melt shop. At the scrap aisle, cranes scooped the scrap out of the railcars and dumped it into a charging bucket. The bucket was transferred, again by railcar, to the furnace area where its contents was dumped into one of two electric arc furnaces. The furnace melted the scrap by means of electric charges. Varying amounts of different elements were added to the bath of liquid steel during the melting process to obtain the grade of carbon or alloy steel desired. Chemical analysis checks were made at this time.

When the heat was molten, it was transferred by means of a ladle and poured into either ingot molds or into a continuous casting machine. The ingot molds were located in an area of the plant known as the teeming aisle. The casting machine was located next to the teeming aisle and had two strands which produced 60- and 80-inch-wide slabs which were 10 inches thick. Ingots were both narrower and thicker than slabs. Some alloy steels were processed through a vacuum degassing machine to remove impurities before being poured into the caster or ingot molds.

The ingots and slabs were transferred to the slab yard, by means of a set of rollers, where they were inspected, condi-

tioned and cut into smaller pieces by acetylene torches. Next, they were taken by railcars to the area of the plate mill known as the steel yard. At the plate mill the ingots and slabs were reheated, in either a soaking pit or a reheat furnace. The reheat furnace handled only slabs whereas the soaking pits could handle either slabs or ingots. Two employees operated the reheat furnace. After being reheated, the slabs and ingots were passed through a 2-hi mill and a 4-hi mill which rolled them into steel plates. The plates were then flattened by a plate leveler and cooled in a cooling bed.

After cooling, the plates were identified with customer information. They were then cut into desired sizes by a series of mechanical shears or by employees using acetylene torches. The plates were then inspected. Any defects found were removed by grinding or welding to produce the finished product. In the special finishing department, certain plates were heat-treated, pressed, pickled, or shotblasted. Some were painted.

Finished plates were transported to the shipping department where they were loaded by means of straddle hoists or overhead cranes onto trucks or railroad cars and shipped to customers.

CitiSteel's production begins in the scrap yard where scrap is received from its suppliers. There it is unloaded, sorted, and stored. The usable scrap is divided into appropriately sized loads and otherwise made ready for transport to the melt shop. Unlike Phoenix, CitiSteel has contracted out the running of the scrap yard to another company. CitiSteel employees are not employed in the scrap yard.

After a load of scrap arrives at the furnace area, it is processed through the one electric arc furnace in use. The one furnace produces seven or eight heats per day, as many as Phoenix produced using both furnaces. This was made possible by improvements built into the furnace by CitiSteel when it was revamped. At the melting stage, CitiSteel does not perform any metallurgy work on the heat at the furnace. Rather, after the heat is poured from the furnace into the ladle, it is transferred to a "stir station" located where the old vacuum degassing station used to be. There, CitiSteel employees balance the chemical composition of the heat in the ladle. This saves time since by not taking time to balance the chemical composition at the furnace, it makes the furnace available for another heat sooner. Whereas, at Phoenix, the heat could be sent to a number of places for continued processing, at CitiSteel, all heats proceed directly to the 80-inch strand of the continuous caster. Because of the innovations made, the caster receives one ladle of steel after another. Downtime is held to a minimum.

After the slabs emerge from the caster, they are cut and sent to the slab yard just as at Phoenix. There, since CitiSteel has eliminated the soaking pits, all the slabs are processed through the newly redesigned reheat furnace. After the slabs are reheated, they are rolled through the 2-hi and 4-hi mills just as was the case with Phoenix. However, since CitiSteel does not roll ingots or alloy or stainless steels, which are harder than carbon steel and are rougher on the rolling equipment, there is less maintenance required and less downtime. Also, since CitiSteel does not produce the variety of sizes of steel plates that Phoenix did, it saves time by not having to make as many adjustments as did Phoenix.

After rolling, CitiSteel does not heat-treat, shotblast, pickle, or paint any of its products. It does none of the special

finishing work that Phoenix did but ships it out as "plain vanilla," i.e., commodity carbon steel.

The areas of the Claymont plant that had been devoted by Phoenix to the production of specialty and alloy steel products have not been used by CitiSteel since it occupied the plant and began its own production. It does not use the machinery located in the special finishing department nor the vacuum degassing equipment. For the most part, it does not use the area of the buildings housing this equipment. It does not use the ingot pouring facilities nor the soaking pits since it does not pour ingots. One-half of the soaking pit building is not in use. It operates only one of the two strands of the continuous caster and only one of the two electric arc furnaces. The CitiSteel shipping department operates only the overhead cranes for loading purposes while the straddle hoists remain idle.

Areas of buildings dedicated to special finishing by Phoenix have been transformed into inside storage facilities by CitiSteel. CitiSteel has also discontinued the use of the weld and press shop, the pipe mill building, the annex building, and the trailer, all located north of Philadelphia Pike.

Except for those areas no longer in use, CitiSteel unit workers continue to work in the same general locations as they had in the Claymont plant under Phoenix. CitiSteel continues to use most of the physical plant used by Phoenix, and most of the departments occupy the same spaces. The plate mill and melt shop employees work in the same areas. The plant storerooms remain where they had been. Management and office clerical employees occupy the same office building.

In 1986, Phoenix employed workers in the production and maintenance unit in 134 job classifications, with job descriptions for each classification. These job descriptions existed pursuant to the United Steelworkers of America and Coordinating Committee Steel Companies Agreement. Under the collective-bargaining agreement with the Union, Phoenix could not create or change job descriptions unless it first negotiated with the Local, the International and the Coordinating Committee.

According to Joseph Hearn, the job classifications in effect at Phoenix were sacrosanct. If an employee performed work which was covered by another employee's job description, but not his own, a grievance would probably result. Such grievances were fairly common, numbering between 25-30 per year, despite efforts by supervisors to avoid questionable assignments. Written job descriptions covering each classification defined, in precise terms, exactly what duties were to be performed by an employee covered by a particular job description. Each job description outlined the equipment or machine to be used, the work procedure to be followed and the supervision to be received by each employee in the classification which the job description covered. For the most part, Phoenix employees performed only work covered by their job description just as the rules required. Management did not require them to do otherwise for fear that a grievance would be filed.

The Claymont plant, as operated by CitiSteel, employs workers in about 25 classifications. The object of reducing the number of job classifications, according to Lu Ming, was to enrich job content and broaden the responsibility of each job position. The objective was accomplished by having each

CitiSteel employee perform several functions, each of which had been covered by a separate job classification at Phoenix.

CitiSteel production workers can be assigned maintenance jobs and can be told to operate equipment which is not normally assigned to them. CitiSteel's job descriptions provide that an employee may be required to perform other similar or related duties, as assigned, in accordance with work load priorities, and perform preventive and general maintenance duties, as assigned and directed during scheduled and non-scheduled mill downtime. They may be required to operate mobile equipment and/or pendant controlled cranes to transport and transfer material as required for operations assigned. The 25 or so CitiSteel job descriptions thus cover everything that has to be done out in the plant.

The record reflects that CitiSteel, in some cases, has combined several Phoenix job classifications or repressibilities to create one CitiSteel job classification. Thus, records indicate that in the maintenance and refractory areas, whereas Phoenix employed 172 employees in 32 job classifications, CitiSteel has reduced those numbers to 47 employees in 7 job classifications. CitiSteel has totally eliminated only 2 of the 32 job classifications. The remaining 30 Phoenix job classifications have been consolidated into the 7 CitiSteel job classifications now extant. Similar reductions in job classifications have occurred in the various other areas at CitiSteel.

As noted, some jobs have not been combined with others but have been totally eliminated such as all scrap yard work, the in-plant railroad work, and certain maintenance functions. Although certain jobs and classifications have been combined and others eliminated, and although CitiSteel workers are required to perform additional duties, the work performed by them is the same work that had been performed by Phoenix employees in the production and maintenance unit, before the plant closed.

The ability of the CitiSteel production and maintenance employees to perform several functions is the result of cross-training. Initially, there were formal training sessions conducted with the help of the State of Delaware. Thereafter, management encouraged each employee with a special skill to learn other skills so that if he were faced with a problem which is not strictly within the parameters of his expertise, he would be able to solve the problem himself rather than seek the aid of another employee. Thus, millwrights and electricians are encouraged to learn each other's trade and to perform tasks which would have been forbidden under the union contract in force at Phoenix. The flexibility achieved through cross-training improves efficiency and saves time, according to Respondent's witnesses.

The cross-training of employees is also beneficial in that, if a piece of equipment or machine breaks down, its operator, cross-trained in other jobs, can be used to perform other tasks, perhaps in another area of the plant. The actual cross-training is sometimes under the tutelage of supervisors but sometimes it is a matter of one rank-and-file employee training another.

Working conditions at CitiSteel differ in several respects from those that were in effect at Phoenix, before it closed. The fact that workers at CitiSteel perform numerous tasks and are not constrained by contractually enforced rules limiting their work only to jobs included within their classification and job description, has already been discussed. However, the working conditions at CitiSteel differ from those

that were in effect at Phoenix, in a number of other ways. For example, whereas at Phoenix, supervisors were generally prohibited from performing unit work, at CitiSteel there are no such restrictions and supervisors are encouraged to perform any work that will get the job done. There are also differences in the grievance procedures. The grievance procedure at Phoenix was contractual and formal, and provided for binding arbitration. At CitiSteel, the grievance procedure is informal and discretionary. At CitiSteel, there are no restrictions on subcontracting. At Phoenix, there were contractual limitations. At CitiSteel, management can appoint any employee as a temporary supervisor. At Phoenix, there were procedural restrictions under the contract. At CitiSteel, work scheduling and the workweek are not subject to contractual limitations as they were at Phoenix. The same is true with regard to overtime, recall procedures, the filling of temporary vacancies, and promotions. Finally, with regard to economic terms of employment, at CitiSteel the wage range for rank-and-file employees is \$8.50 to \$16 per hour and is not stratified but dependent on the number of skills an employee is capable of performing. At Phoenix, the wage range was \$9.40 to \$14.10 per hour and was dependent on job classification. Retirement plans and other fringe benefits also differ.

CitiSteel has made a number of improvements at the Claymont facility which Respondent claims has had the effect of its workers viewing management in a more favorable light than Phoenix employees viewed their management. One such improvement is in the exhaust system in the melt shop which was operating inadequately under Phoenix, causing problems of dust and smoke accumulating in the air. CitiSteel made the necessary repairs. Other improvements include upgrading the locker room facilities, removing time-clocks, removing different colored hard hats in favor of everyone wearing the same white hard hats,¹⁷ permitting rank-and-file employees the use of the parking lot previously reserved for supervisors, and enforcing safety regulations to a greater degree.

The Clerical and Technical Unit

Phoenix recognized the unit of plant clericals, office clericals, nurses, and technical employees at the Claymont plant on July 24, 1964. Local 6627 was chartered to assist in the administration of any collective-bargaining agreements covering employees in that unit since that date. Recognition was voluntary and the unit was never formally certified by the Board.

The unit included "all clerical nonproduction employees that were not very definitely and succinctly exempt." Members of the unit worked in the office building, plate mill, steel production area, and metallurgy department. Originally, the unit was referred to as the office and technical unit, later as the clerical and technical unit.

The unit consisted of office clerical, plant clerical, and technical employees. The office clericals were divided into 20 job classifications. These employees all worked in the main office or in the annex located immediately behind it. Eleven of the twenty job classifications were supervised by accounting or finance supervisors. These were, as of 1986,

the cost statistical clerk, the senior accounts payable clerk, payroll clerk, billing clerk, accounts payable approval clerk, code clerk, accounts payable clerk A, (adding) machine operator, production record clerk (accounting), invoice typist, and clerk typist. A few of the classifications were not filled at the time. The accounting and finance supervisors were located in the main office building. The computer operator, keypunch operator, and senior keypunch operator were supervised by MIS supervisors who were located in the main office building. The multilith operator was supervised by purchasing department supervisors located in the main office building. The order pricing clerk, order checker, change order clerk, and promise clerk were supervised by the sales supervisors who were located in the main office building. The EDP control clerk was supervised by production control supervisors located in the main office building.

The office clerical employees performed their day-to-day duties in the main office building rather than in production areas of the mill or elsewhere. They were rarely expected to visit the mill and therefore were not required to wear protective clothing—hard hats, boots, glasses, and ear plugs. They punched the timeclock in the main office and performed duties which were more concerned with the business end rather than with plant operations. Breakdowns in the melt shop or rolling mill which would directly affect the production and maintenance employees would not ordinarily directly affect the office clerical employees.

In 1986, there were 33 plant clerical classifications. Five of the job classifications were located in the main office building. These were the head provider-scheduler, clad provider, providers, specification examiner, and turn clerk. The other 28 classifications were located at various operational sections of the plant. The plant clericals working in the main office building were so classified because their activities were related to the operation of the plant. Thus, the providers would translate orders into steelmaking requirements by taking cutting instructions to production employees at the continuous caster. They would then trace the slabs to the steel yard side of the road and give instructions to employees there on how to roll the slabs. The providers would be dealing with the plant employees throughout the day and would make frequent trips from the office building to the plant.

The 28 classifications not located in the main office building were located throughout the mill in the plate mill or melt shop. Nine plant clerical classifications worked in the plant's storeroom. These were the buyer, follow clerk, posting clerk, purchase order typist, department clerk, stores clerk, inventory clerk, stores receiver, and inventory record clerk. The freight clerk worked in one of the shipping departments in the traffic area. The steel production expediter was located in an office in steel production outside the melt shop. The order detailer and production record clerk worked in the plate mill in the special finishing area. The shipping clerks worked in the "as rolled" shipping area, special finishing area, and the special finishing shipping area. The clerk typist could work in various areas. The status clerk worked in special finishing. The expediters worked in the plate mill and in special finishing. The mill clerk worked in the steel yard. The scrap clerks worked in the scrap aisle of the melt shop. The various test report clerks and QC posting clerks worked in the physical test lab which was near special finishing. The observers worked in the melt shop and the maintenance clerks

¹⁷ At Phoenix, different colored hard hats served as departmental identifications.

and the scheduler worked in the maintenance office building located outside the plate mill area.

The plant clericals were supervised by production control people, purchasing people in the storeroom areas, and by operating supervision. Supervision included the general foremen, plate mill superintendent, and shipping superintendent, the same supervisors that supervised production and maintenance personnel. The expeditor testified that she considered herself part of steel production. Her supervisor was the supervisor of the materials department, steel production.

Unlike the office clerical employees, the plant clerical employees located in the plant wore hard hats and protective glasses. The office and plant clerical jobs were not interchangeable. Any breakdown in production would affect the work of the plant clericals because their work was associated with production.

In 1986, there were 7 technical job classifications filled by 11 employees who performed various chemical and physical tests on the steel products produced at Phoenix in the chemical lab or the physical testing lab. Chemical analysis was conducted by a chemical technician or senior technician whose work was performed when a heat of steel was still in its molten stage. A test sample was taken from a heat in the melt shop and taken to the chemical lab. There it was analyzed either by the use of a spectrometer or by a procedure known as wet analysis. The purpose was to determine the physical chemistry of the steel, the amount of carbon, manganese, sulfur, etc., which it contained. These were compared to the specifications and a report prepared.

The head technician and the senior technicians were responsible for conducting physical analyses. These were done in the physical testing lab located in the special finishing area. Their work involved testing the quality of the finished plate steel products after they had been rolled in the plate mill. The physical testing was of two types. In one, test pieces were cut from a rolled plate, taken to the lab and tested there for tensile strength and yields. In the other, the NDT (nondestructive testing technicians) ultrasonically tested plates without cutting them.

The technical employees were supervised by chemical lab and physical lab supervisors rather than production supervisors or supervisors from the main office building. The technicians punched the timeclock in the plant located closest to their work stations. Like the other employees who worked in the plant, they were required to wear safety gear.

The technical employees had to be trained, tested, and code certified before they could conduct ultrasonic examinations. Use of the spectrometer had also to be taught.

The parties have stipulated that CitiSteel USA employed a substantial and representative complement of clerical and technical employees as of June 13, 1989. It was also stipulated that a majority of the clerical and technical employees employed by CitiSteel, as of June 13, 1989, had previously been employed by Phoenix in the C&T unit.

CitiSteel employs 5 office clerical employees in 3 classifications compared to 21 office clerical employees in 17¹⁸ classifications which existed at Phoenix. It employs 3 plant clericals in 2 classifications whereas Phoenix employed 44 plant clericals in 24 classifications. As of June 13, CitiSteel employed no employee who was classified as a technical em-

ployee whereas Phoenix had employed 11 employees in 6 technical classifications. In explanation, Daniel Brown, CitiSteel's manager of production planning and control, testified:

The philosophy at Citi was that the hourly people were going to do more diversified job duties. Also, supervisors and managers did a lot more work, particularly clerical work. CitiSteel did not have all the product lines that Phoenix had. And a lot of these technical services . . . were contracted out to outside contractors.

At CitiSteel, one of the two accounts payable assistants among the office clericals reviews invoices and incoming bills from vendors, certifies that services or goods were actually received, and pays the bills after obtaining approval. This employee also summarizes invoices and assigns them to various cost centers for budgeting. He or she also adds up any and all numbers from invoices. At Phoenix, these jobs were performed by three senior accounts payable clerks, a cost statistical clerk, and an adding machine operator. Now, according to Respondent, one CitiSteel office clerical does the work of five Phoenix employees in three classifications.

At CitiSteel, the other accounts payable assistant is responsible for outgoing shipments. He or she must see that customers are invoiced and that pricing and trucking information appear on the invoices. At Phoenix, these duties were performed by the billing clerk, two code clerks, the adding machine operator, and the invoice typist. Thus, the one CitiSteel accounts payable assistant performs the work previously done, in part, by five Phoenix employees in four job classifications.

At CitiSteel, the financial clerk is responsible for the payroll for both hourly and salaried employees. At Phoenix, two payroll clerks did the hourly payroll and an exempt employee did the salaried payroll.

Except for the two CitiSteel clerk typists, the remaining Phoenix office clerical jobs were all eliminated at CitiSteel due to automation or reassignment of duties to either supervisors or salaried personnel. Thus, the classifications of key-punch operator and EDP control operator were eliminated when Respondent did away with the keypunch system. The work of the order pricing clerk, the order checker, and the change order clerk, all classifications within the Phoenix office clerical unit, has been assigned to customer service representatives who are salaried personnel in the sales department.

CitiSteel has two plant clerical job classifications: storekeeper and clerk typist. The two storekeepers are responsible for inbound shipments of supplies and materials that are used throughout the plant. They issue parts and supplies to people in the plant and maintain inventory records of what is coming in and going out. They perform the functions of five different Phoenix plant clerical classifications, i.e., the stores clerk, the inventory clerk, the stores receiver, the inventory record clerk, and some of the posting clerk's work.

At Phoenix, the stores clerk was responsible only for incoming shipments of office supplies. He distributed them to whomever had ordered them and kept a supply in a separate storeroom for that type of material. The inventory clerk inventoried inbound shipments of nuts, bolts, and similar materials which were kept in bins in the storeroom. The stores

¹⁸ Some classification were vacant at Phoenix in 1986.

receiver "accepted inbound shipments of materials that were to be kept in the storeroom or directed to other areas of the plant. The inventory records clerk was responsible for all the inventory records in the storeroom. The posting clerk was responsible for posting purchase orders and keeping track of orders that were placed and, when those orders were received, posting the proper documentation on them. The functions of these five plant clericals were consolidated into one job classification held by the two storekeepers.

The only other CitiSteel plant clerical position is the clerk typist. The duties performed by CitiSteel's clerk typist are similar to those performed by Phoenix's clerk typist. The CitiSteel clerk typist can be assigned work anywhere in the mill.

The remaining Phoenix plant clerical job classifications were either eliminated due to product line reduction or had their functions consolidated with those of supervisors, production, or salaried personnel. Thus, CitiSteel's production control supervisors perform, in a limited way, the work previously done by the providers and handle paperwork that turn clerks did at Phoenix. CitiSteel's salaried production, control, finance, and accounting personnel now perform the duties formerly performed by Phoenix's production record clerks. CitiSteel loader-checkers now do the work of Phoenix's shipping clerk. Phoenix's order detailer and expeditor jobs were eliminated when CitiSteel ceased the production of specialty products.

As of the representative complement date, CitiSteel did not employ any employees in the technical job classifications that had existed at Phoenix.¹⁹ Outside testing facilities conducted CitiSteel's physical testing while Chinese engineers, temporarily at CitiSteel, and an outside consultant, Greg Clouser, performed the chemical testing. These persons were not paid as hourly employees.

Conclusion

In accordance with the stipulations of the parties, I find that on the representative complement dates, April 17, 1989, for production and maintenance employees, and June 13, 1989, for clerical and technical employees, a majority of CitiSteel's employees were former employees of Phoenix. The principal issue remaining is whether similarities between the Phoenix operation and the CitiSteel operation manifest substantial continuity between the two enterprises.²⁰ If the existence of substantial continuity is found, then CitiSteel will have been found to be the successor to Phoenix. Successorship bears with it a concomitant duty to bargain. Failure to do so requires a finding of violation of Section 8(a)(5) and (1) of the Act. A finding of substantial continuity depends, in turn, on whether CitiSteel has acquired substantial assets of Phoenix and has continued, without interruption or substantial change, Phoenix's business operations.²¹ In determining whether there is substantial continuity, the factors being considered must be viewed from the perspective of the

former employees of Phoenix after they were employed at CitiSteel.²² Factors to be considered, the Supreme Court noted in *Fall River*,²³ include:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

Respondent, in its brief, urges that the trier of fact give consideration to the nature and extent of the interruption in the business caused by the hiatus in operations in the transfer of the Claymont plant from Phoenix to CitiSteel as well as to the "substantial changes" in CitiSteel's business compared to that of Phoenix. It argues that both issues should be viewed from the point of view of the former employees of Phoenix: "how the hiatus impacts employee expectations toward reemployment and how the business changes affect employee attitudes toward representation."

Hiatus

Phoenix ceased the shipment of steel from its Claymont plant in March 1987. CitiSteel shipped its first regularly scheduled order of plate steel in February 1989. Thus, there would appear to be a hiatus of about 2 years, a relatively long period of time, but not a record for cases where successorship was eventually established.²⁴

The length of the hiatus and what happens during this period has long been held to be an important factor in determining what the expectations of the involved employees might be toward substantial continuity. The Supreme Court, in *Fall River*, supra, stated (482 U.S. at 45):

Yet such a hiatus in only one factor in the "substantial continuity" calculus and thus is relevant only when there are other indicia of discontinuity. . . . Conversely, if other factors indicate a continuity between the enterprises and the hiatus is a normal start-up period, the "totality of the circumstances" will suggest that these circumstances present a successorship situation.

In the instant case, the hiatus was no mere vacuum. On the day the shutdown was announced, it was accompanied by a statement to the effect that Phoenix was seeking out a buyer for the Claymont plant. In the months that followed, a steady stream of articles appeared in the local press concerning interested potential buyers. I find that this flow of information to the public, in general, and to the former Phoenix employees, in particular, served to bridge the void which would have existed during the period of the hiatus between the cessation of production at Phoenix and its startup at CitiSteel. It is not that the various articles on the subject warrant a finding that they gave rise to any expectations on the part of the former Phoenix employees, particularly during the early months of the hiatus. The stories were too factually

¹⁹ In mid-July 1989, CitiSteel hired employees to perform technical functions. Some were sent for specialized training in Boston to learn how to run the melt shop spectrometer. Others were trained to inspect steel for defects.

²⁰ *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

²¹ *Id.* at 43 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)).

²² *Ibid.*

²³ *Ibid.*

²⁴ *NLRB v. Rockwood Energy Corp.*, 942 F.2d 169 (3d Cir. 1991).

inadequate to reflect any probabilities, and a probability must be evident before an expectation is warranted. The articles reflected mere possibilities which kept hopes alive. Those hopes were potential expectations at that time, for if the interested buyers negotiated a purchase with the announced intention of going into production, those hopes, those potential expectations, would ripen into actual expectations and the jobless could, because of their experience, expect to regain their jobs with substantial continuity, and that's what happened.

The hopes of the former Phoenix employees most certainly must have risen each time the newspapers carried a story indicating that a new buyer had been found or that negotiations had progressed toward a purchase. Similarly, when newspaper articles reported that a potential deal had fallen through or that new impediments to an impending purchase had been discovered, the hopes of these individuals would necessarily fall. It is clear from actual history, however, that the former Phoenix employees never totally gave up hope and eventually returned to work in numbers sufficient to become the majority of the workforce at CitiSteel.

In early June, when CitiSteel actually occupied the Claymont plant, Hearn and 4 other members of Phoenix management were hired and it was announced that 300 employees would be hired to make steel, the hopes of the former Phoenix employees, were converted to expectations, particularly in light of statements made by CitiSteel officials that their company would hire as many former Phoenix employees as possible.

In late June, and thereafter, newspaper reports of the extensive refurbishing of the plant and equipment at Claymont together with stories concerning CitiSteel's expectation of hiring 300 to 350 employees and its commitment to hiring qualified former Phoenix employees could not but reinforce the expectations of those employees.

In addition to the reports of continued negotiations between Phoenix and various prospective buyers which kept hope alive among former Phoenix employees and helped bridge the period of hiatus, I find that the continued activity of the Union on behalf of its members had a similar effect.

Thus, when Local 3182's president, Walter Brodzinski, took the initiative and invited Joseph Hicks to the union hall to conduct the job workshops and a United Way representative to advise the members what services were available for the unemployed, it was not meant to lead the membership into believing that the relationship between them and the Union and between them and the Claymont plant was permanently over, as Respondent contends. Rather, it was a show of concern on the part of the Local's officers for the welfare of the membership during uncertain times, an attempt to enable the former Phoenix employees to find a way to feed themselves and their families during their layoff from the Claymont plant, whether the layoff was temporary or permanent. If this were a kiss-off, as Respondent contends, the job could have been done with a word. Instead the Union permitted the Delaware Department of Labor to conduct periodic meetings at the union hall, over a period of 3 months, for an estimated 230 members to help them survive. One of them who did, Brodzinski himself, succeeded in finding employment outside the area. I do not read into his success, an abandonment of the membership but merely a case of a

working man fulfilling his duty to support himself and his family.

Respondent contends that when the International placed the two Claymont locals under an administrator, this indicated that it had abandoned all hope that Claymont would reopen. Subsequent actions by the Union, however, belie that contention. Moreover, the International was the certified collective-bargaining representative of the units of employees at the Claymont plant. The two locals were chartered solely to administer the contracts under which the two units of employees worked. When the plant closed and all of the employees in the units were laid off, including the local officers, there was no one to protect, no one to file grievances, and no duties for the local officers to perform. The logical thing for the International to do under such circumstances was to place the locals under an administrator and to relieve the local officers of their duties so as to permit the International to run the affairs of the locals, pending their reinstatement. The fact that the locals were placed under administratorship is not significant.²⁵

When the International relieved the local's officers of their duties there was no one to hold meetings, so the International closed the union hall. Although one witness testified that the closure of the union hall convinced him that the plant would not reopen, when the union hall was sold, in November 1988, after the plant had already reopened, the sale obviously could not have had any effect on the employees expectations. When the proceeds of the sale were placed in an escrow account for the locals, it clearly indicated an intention to reactivate the locals if the Union were successful in obtaining representative status.

Aside from the steps taken by the Union to deactivate the locals, which Respondent contends reflects an abandonment of its Claymont membership during the period of the hiatus, the record indicates that the Union remained active on behalf of those employees. Thus, its representatives met with all of the serious potential purchasers of the Claymont plant as the exclusive collective-bargaining representative of the employees in the Claymont units. They met at various times with Serlin, the Lukens group, Chang, CITIC, and their attorneys, attempting to obtain commitments to recognize and bargain with the Union.

Gerber-Saionz, as the Union's attorney, filed claims on behalf of the unit employees in bankruptcy court and represented them in the proceedings. Other union representatives also attended these proceedings. She organized the Employee Creditors Committee which represented employees in both Claymont units and met with them regularly. She also attended negotiations for the purchase of the plant and met several times with Chang's attorney in an effort to schedule a meeting between the Union and Chang. Both she and union representatives met with and spoke over the telephone to unit employees concerning the prospects of the plant reopening and the status of sales negotiations.

Following the actual purchase of the Claymont plant by CitiSteel, the Union wrote formal letters demanding recognition and bargaining. It apparently lobbied the Lieutenant Governor to intercede on its behalf to get CitiSteel to meet with it for this purpose.

²⁵ *Phoenix Pipe & Tube*, 302 NLRB 122 (1991).

Finally, the Union made its presence known during the period of the hiatus by lobbying the Delaware State Senate to obtain legislation to give preference to former Phoenix employees who applied for employment at CitiSteel.

In early October, when it came to the attention of the Union that CitiSteel was hiring, it wrote letters to all former Phoenix employees urging them to apply. It scheduled a meeting of these employees where it did the same. A sufficient number of them did so, and as of April 17, they represented a majority of CitiSteel's production and maintenance complement. As of June 13, they represented a majority of its clerical and technical complement.

Respondent, in its brief, contends that certain obstacles arose during the hiatus which had the effect of destroying any expectations that former Phoenix employees might have had that they would one day be recalled to their jobs at the Claymont plant. In addition to those already discussed, Respondent cited as such obstacles, the secrecy issue and the Defense Department's initial objections to the sale, the effect of the Coastal Zone Act, the objections of the environmentalists and the bond issue. With respect to these issues, I find that they were merely glitches which, like the fits and starts of the purchase process, only resulted in a temporary lessening in the hope for purchase of the Claymont plant and eventual employment of the former Phoenix employees.

In summary, I conclude that the specific facts, as reflected by the record in this case, do not warrant the conclusion that either the hiatus or its length are controlling. I find it to be only one of the factors to be considered in determining whether or not there was substantial continuity and whether or not a successorship situation is present in this case.

Substantial Continuity

In *Fall River*, the Supreme Court stated that to determine whether a new company is a successor to the old, the Board is required to focus on whether the new company has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.²⁶

In *Fall River*, the Supreme Court said that certain factors should be considered in determining whether or not there is substantial continuity from the point of view of the employees. As applied to the instant case these factors include whether the business of Phoenix and CitiSteel are essentially the same; whether the employees of CitiSteel are doing the same jobs in the same working conditions under the same supervisors as employees of Phoenix; and whether CitiSteel has the same production process, produces the same products, and has basically the same body of customers as Phoenix.

The factual section of this decision has exhaustively treated the numerous changes made by CitiSteel, in its operation of the Claymont plant, compared to that of Phoenix Steel. I see no reason to repeat those changes and cite relevant case law to each change, as General Counsel and Charging party have most helpfully done, in order to show that successorship has been found in earlier cases, despite the fact that one or more of the changes present in the instant case were present in the earlier cases. Rather, as suggested by Respondent, and in keeping with the dictates of existing law,

I shall base my decision on the congeries of changes reflecting the situation extant at CitiSteel, as of the relevant dates.

I find that, despite the numerous and thoroughly documented changes instituted by CitiSteel, after its purchase of the Claymont plant, substantial continuity remained intact,²⁷ that CitiSteel was and is the successor to Phoenix, that the former employees of Phoenix were entitled to continued representation by the Union, and that Respondent's failure to recognize and bargain with the collective-bargaining representative of its employees was in violation of Section 8(a)(5) and (1) of the Act.²⁸

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization with the meaning of Section 2(5) of the Act.

3. (a) All production and maintenance employees employed at the Claymont facility; excluding executives, foremen, supervisors, technical, office and clerical employees, plant protection, first-aid men, nurses, draftsmen, yardmasters, listing clerks, and mill providers constitute a unit appropriate for the purpose of collective bargaining within the meaning of the Act.

(b) All office and plant clerical employees and technical employees employed at the Claymont facility; excluding production and maintenance employees, professional employees, confidential employees, guards and supervisors constitutes a unit appropriate for the purpose of collective bargaining within the meaning of the Act.

4. By refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in appropriate units, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and from infringing in any like or related manner upon its employees' Section 7 rights and that it take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

The Respondent, CitiSteel USA, Inc., Claymont, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

²⁷ *Phoenix Pipe & Tube*, supra.

²⁸ This finding applies to the clerical and technical unit as well as the production and maintenance unit. Although the clerical and technical unit may not be the most appropriate unit, it need not be. I find no reason to disturb a successful collective-bargaining relationship which has existed for over 25 years. *Great Atlantic & Pacific Tea Co.*, 153 NLRB 1549 (1965).

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁶ Citing *Golden State Bottling Co. v. NLRB*, supra.

(a) Refusing to bargain with United Steelworkers of America, AFL-CIO-CLC as the exclusive bargaining representative of the employees in the appropriate bargaining units.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production and maintenance employees employed at the Claymont facility; excluding executives, foremen, supervisors, technical, office and clerical employees, plant protection, first-aid men, nurses, draftsmen, yardmasters, listing clerks, and mill providers.

All office and plant clerical employees and technical employees employed at the Claymont facility; excluding production and maintenance employees, professional employees, confidential employees, guards, and supervisors.

(b) Post at its Claymont Delaware facility copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

³⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Steelworkers of America, AFL-CIO-CLC as the exclusive collective-bargaining representative of the employees in the appropriate bargaining units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate units on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

All production and maintenance employees employed at the Claymont facility; excluding executives, foremen, supervisors, technical, office and clerical employees, plant protection, first-aid men, nurses, draftsmen, yardmasters, listing clerks, and mill providers.

All office and plant clerical employees and technical employees employed at the Claymont facility; excluding production and maintenance employees, professional employees, confidential employees, guards, and supervisors.

CITISTEEL USA, INC.